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## ASSUMPTION OF RESPONSIBILITY BY PUBLIC AUTHORITIES

*Tom Cornford\**

### ABSTRACT

Since the House of Lords' decision in the Gorrington case, there can be no reason for imposing a duty of care in negligence on a public authority that would not also count as a reason for imposing a duty of care on a private person. In this context assumption of responsibility, as the primary concept used to explain the imposition of a duty of care in novel situations, acquires great importance. This article explores whether the concept's application to public authorities produces satisfactory results and, finding that it does not, concludes that this underlines the folly of insisting that public authorities must be treated in the same way as private persons.

**Keywords:** tort, negligence, assumption of responsibility, public authorities

### 1 INTRODUCTION

The tort liability of public authorities in English law is sometimes said to be underpinned by "Dicey's equality principle", the principle that public authorities are to be treated in exactly the same way as private persons.<sup>1</sup> Between the House of Lords' decision in *Anns v Merton Borough Council*<sup>2</sup> and its decision in *Gorrington v Calderdale Borough Council*,<sup>3</sup> this assertion was of doubtful accuracy. *Anns* appeared to establish that a body's subjection to the kind of duty or its possession of the kind of power characteristic of a public authority was a reason (although not a conclusive one) to impose on it a duty of care. The case thus implied the existence of a form of negligence liability special to public authorities and this implication remained a feature of the case law

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\* School of Law, University of Essex. Email: [tomc@essex.ac.uk](mailto:tomc@essex.ac.uk)

<sup>1</sup> See P Cane, 'Damages in Public Law' (1999) 9 Otago Law Review 489, 490.

<sup>2</sup> [1978] AC 728.

<sup>3</sup> [2004] UKHL 15, [2004] 1 WLR 1057.

for a quarter of a century afterwards. In *Gorringe*, however, it was rejected. *Gorringe* is authority for the proposition that the presence of a statutory power or duty is never a reason for imposing a duty of care and the practical effect of this is to return the law to a state in which it approximates Dicey's principle much more closely.

One possible response to this turn in the law is to consider it in the context of the wider question of the principle's legitimacy. Critics argue on a variety of grounds that justice demands some specialized form of administrative liability (although this need not, of course, take the form of a specialized variant of the tort of negligence).<sup>4</sup> Defenders of the present dispensation either approve of Dicey's principle or are pleased to see negligence confined to what they think of as its traditional role of providing redress for the kinds of wrong that private persons are capable of committing.<sup>5</sup>

A second possible response, however, is to examine in detail how the law of negligence can be made to apply to public authorities once the option of basing a duty of care on a statutory power or duty is removed. This means exploring how a set of concepts developed in order to determine whether there should be a duty of care where the defendant is a private person can be made to do the same where the defendant is a public authority. Such concepts apply easily enough, of course, where a public authority performs an act identical in kind to one that might be performed by a private person, as where one of its employees carelessly inflicts physical injury on a member of the public. But their application becomes more difficult where a public authority causes harm by performing acts lacking an obvious private equivalent such as providing or failing to provide welfare services or exercising regulatory powers. A number of supporters of the current law have explored how the concepts in question

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<sup>4</sup> Post-*Gorringe* assertions of this view are to be found in T Cornford, *Towards a Public Law of Tort* (Aldershot 2008) and the Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Comm CP No 187). Dicey's principle has recently been questioned in S Tofaris and S Steel, 'Negligence Liability for Omissions and the Police' (2016) 75 CLJ 128, 136.

<sup>5</sup> Notable articles approving of the change in the law wrought by *Gorringe* are S Bailey, 'Public Authority Liability in Negligence: the Continued Search for Coherence' (2006) 26 LS 155 and D Nolan, 'The Liability of Public Authorities for Failing to Confer Benefits' (2011) 127 LQR 260. *Gorringe* also consorts well with the view of the law promoted by the rights theorists Robert Stevens and Allan Beever: see R Stevens, *Torts and Rights* (Oxford 2007) ch 10; A Beever, *Rediscovering the Law of Negligence* (Oxford 2007) ch 9.

apply to public authorities.<sup>6</sup> Their conclusion, or perhaps better, their underlying assumption is that the application of these concepts can produce a body of law that is coherent and in conformity with generally accepted notions of fairness. As a critic of the current law, my view is the reverse: careful examination of the application to public authorities of concepts developed for the purpose of determining the incidence of the duty of care in relation to private persons tends to demonstrate the inadequacy of the current law and the folly of ignoring the public nature of public authorities. Detailed consideration of the workability of the concepts currently employed in dealing with public authority cases thus provides another line of attack for those who regard Dicey's equality principle as misconceived and an anachronism.

In the present article I adopt this line of attack and since the concept most commonly used in English law for determining the incidence of the duty of care in novel cases involving private persons – and hence also in cases involving public authorities – is assumption of responsibility, I make it my focus.<sup>7</sup> The questions I shall seek to address are: firstly, how far can the concept of assumption of responsibility take us in explaining the incidence of the duty of care in cases involving public authorities; and secondly, if it cannot provide a satisfactory rationale for the current case law, might its consistent application provide us with something better. The answer I give to both questions will be negative: the concept does a poor job of explaining the existing law and if one were to try to create a better case law by applying it with rigour and consistency the result would be a body of law in which the incidence of the duty of care would be far more extensive than anything envisaged by the concept's proponents but which at the same time contained glaring inconsistencies. Far from providing a workable alternative to the previous practice of basing a duty of care on statutory powers or duties, I shall suggest, the attempt to make use of assumption of responsibility tends to point us back towards forms of liability that explicitly acknowledge the public nature of public authorities.

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<sup>6</sup> See for example Nolan (n 5); R Bagshaw and N McBride, *Tort Law* (4<sup>th</sup> ed, Harlow 2012).

<sup>7</sup> I believe similar arguments to those I shall make in relation to assumption of responsibility can be made in relation to other concepts intended to apply indifferently to both private and public defendants in determining the incidence of the duty of care: see further (n 87). Space precludes examination of these concepts.

The plan of the article is as follows. Firstly, I attempt to sum up in a few propositions the current state of the law on the negligence liability of public authorities. Secondly, I define how I shall be using the expression “assumption of responsibility” in the rest of the article. Thirdly, I examine the application of the concept to a variety of types of public authority activity. In doing so, I consider both its capacity to explain the existing pattern of outcomes and its potential usefulness in creating a more defensible pattern of outcomes. Fourthly, I conclude in the terms outlined above.

## 2 THE NEGLIGENCE LIABILITY OF PUBLIC AUTHORITIES: THE CURRENT STATE OF THE LAW

The current state of the law can, I believe, be summed up in a few propositions. The first does not pertain specifically to negligence but forms a general background and is worth stating for that reason. This is that English law contains no general principle of administrative liability; or, in other words, there is no general principle that entitles an individual to damages where unlawful administrative action causes that individual harm.<sup>8</sup>

The second is that the existence of a duty of care in negligence can never be based simply on the fact that a public authority possesses a particular statutory power or is subject to a particular statutory duty.<sup>9</sup> This proposition is usually expressed, as I have done, by reference to statutory powers and duties but could perhaps be extended so as to encompass the case in which an authority – for example a servant of the Crown or a police officer – has public law powers or duties that are not statutory in origin. The proposition would then be that an authority’s public law powers and duties do not, without more, give rise to a private law duty of care.<sup>10</sup>

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<sup>8</sup> More or less explicit statements to this effect are to be found from Lord Wilberforce in *Hoffman-la-Roche v Secretary of State for Trade* [1975] AC 295 [358-59] and more recently by Sedley LJ in *Mohammed and others v Home Office* [2011] EwCA Civ 351; [2011] 1 WLR 2862 [61]. For a general overview of the obstacles to gaining reparation for harms done by public authorities see the Law Commission (n 4) especially pt 4.

<sup>9</sup> *Gorringe* (n 3) especially [32] (Lord Hoffmann), [71] (Lord Scott).

<sup>10</sup> There is no authority to either support or undermine this more general, non-statutory form of the proposition, however.

The third proposition is that a public authority may, nonetheless, owe a duty of care in those circumstances in which a private person analogously placed would do so.<sup>11</sup> An authority may thus owe a duty of care when performing a function that, according to established case law, gives rise to a duty of care when performed by a private person; or where its actions satisfy the threefold *Caparo* test in circumstances in which a private person performing the same actions would do so; and it may also do so if it can be said to have assumed a responsibility towards the claimant.<sup>12</sup>

The fourth proposition is that where there are arguable grounds for finding a duty of care, the putative duty should be excluded if it would be in conflict with other duties to which the defendant public authority is subject. This general proposition can be analyzed in turn into two sub-propositions, of which one corresponds to a general tendency while the other represents a strict rule. The first sub-proposition concerns cases in which the proposed duty of care would be a duty vis-a-vis the claimant to deliver the benefit that the defendant authority is under a public law duty to deliver to members of the public generally. In such cases, the tendency is to say that a duty of care should be excluded because it might conflict with the authority's ability to perform its duties to the public as a whole.<sup>13</sup>

The second sub-proposition is that where an authority possesses a power for the purpose of protecting some particular class of person it is inappropriate to impose a duty of care towards some *other* class of person who might be harmed by the power's exercise. This type of argument is

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<sup>11</sup> This has been the law at least since *Mersey Docks and Harbour Board v Gibbs* (1866) LR 1 HL 93.

<sup>12</sup> See further below.

<sup>13</sup> So, for example, the exclusionary rule enunciated in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 excludes a duty of care on the part of the police towards potential victims of crime on the ground that this would interfere with the wider duties they owe to the public as a whole. Since the overruling of the ECtHR's judgment in *Osman v UK* (2000) 29 EHRR 245, [1999] FLR 193, the rule in *Hill* has been reasserted in a number of other cases, for example: *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24, [2005] 1 WLR 1495; *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225; *An Informer v Chief Constable* [2012] EWCA Civ 197, [2013] QB 579; *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 2 WLR 343. For instances of the application of the first sub-proposition outside the police context, see: *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] AC 874; *X v Hounslow London Borough Council* [2009] EWCA Civ 286, [2010] HLR 4.

foreshadowed in a number of earlier decisions<sup>14</sup> but attains the status of a general rule in *Jain v Trent Strategic Health Authority*<sup>15</sup> where Lord Scott (with whom the other members of the House agreed) said the following:

“...where action is taken by a state authority under statutory powers designed for the benefit or protection of a particular class of persons, a tortious duty of care will not be held to be owed by the state authority to others whose interests may be adversely affected by an exercise of the statutory power. The reason is that the imposition of such a duty would or might inhibit the exercise of the statutory powers and be potentially adverse to the interests of the class of persons the powers were designed to benefit or protect, thereby putting at risk the achievement of their statutory purpose.”<sup>16</sup>

The fifth proposition is that a duty of care on the part of a public authority may also be excluded on policy grounds other than those mentioned in connection with the fourth proposition. The fourth proposition concerns the theoretical compatibility of public and private law duties. The fifth proposition concerns the effects of a duty of care on the practical ability of a public authority to fulfil its duties. The policy consideration typically falling under this head is that imposition of a duty of care will lead to overkill or defensive practice and thus inhibit an authority’s ability to carry out its wider duties. Since the *Osman* case, the courts have greatly reduced their reliance on such considerations in the face of the criticism that they were being used in blanket fashion and without adequate evidence.<sup>17</sup> Nonetheless, they have not disappeared

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<sup>14</sup> Eg *Caparo v Dickman* [1990] 2 AC 605; *Harris v Evans* [1998] 1 WLR 1285; *Reeman v Department of Transport* [1997] 2 Lloyd’s Rep 648; *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373.

<sup>15</sup> [2009] UKHL 4, [2009] 2 WLR 248. The conflict here was between the defendant authority’s duty to protect residents of care homes and the duty of care alleged to be owed to the claimant care home owners.

<sup>16</sup> *Ibid* [28].

<sup>17</sup> *Osman v UK* (2000) 29 EHRR 245, [1999] FLR 193. The criticisms made of the English courts in this regard by the ECtHR in the *Osman* case appears to have had a lasting effect despite its later overruling. On the turn from policy considerations to substantive legal rules as a way of controlling liability in cases of public authority negligence see C Booth and D Squires, *The Negligence Liability of Public Authorities* (Oxford 2006) ch 4 especially 4.06, 4.95-98.

altogether from the case law as cases on “the *Hill* immunity” in relation to police work show.<sup>18</sup>

To the propositions I have just described, one can also add what I shall call “the background premise.” This is that the private law principles that determine the incidence of the duty of care in negligence can never be so extended as to require or justify the imposition of a duty of care in relation to the most purely public law functions of public authorities, those involving the exercise of powers to determine the rights or entitlements of citizens.<sup>19</sup> As the name I have given it implies, the background premise is generally assumed to be so obvious as not to need stating.<sup>20</sup> As a result, no justification is ever offered for it but, as I shall argue below, it is not at all clear that it can be justified.

Lastly, before passing on to consider the concept of assumption of responsibility, one more feature of the case law is worth considering, the existence of a strong dissident strain of authority. From the time of *Anns* onward, an influential minority of judges - Lords Wilberforce,<sup>21</sup> Bingham,<sup>22</sup> Woolf<sup>23</sup> and to a lesser extent Lords Nicholls,<sup>24</sup> Slynn<sup>25</sup> and

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<sup>18</sup> See further below.

<sup>19</sup> In the typology below of types of public authority to case in relation to which assumption of responsibility might apply, I call these “legal determination” cases.

<sup>20</sup> An indicator of the existence of the premise in the case law is the tendency in the pre-*Gorringe* case law – not altogether extinguished – to adopt barriers to liability that distinguish sharply between the public and private parts of a public authorities functions: the policy/operations distinction; the requirements that an act be ultra vires or justiciable before liability can arise. In reform proposals the premise is reflected in the idea that two kinds of public authority liability are required, one belonging to private and the other to public law: see *Administrative Justice: Some Necessary Reforms* Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the UK (1988) ch 11; the Law Commission (n 4) pt 4.

<sup>21</sup> In *Anns* itself and see his remarks in *Hoffmann-La Roche* (n 8) [358-59].

<sup>22</sup> See his lordship’s judgment in the Court of Appeal in *X v Bedfordshire* [1995] AC 633 above and his dissenting judgments in *D v East Berkshire* [2005] UKHL 23, [2005] 2 AC 373 and *Smith v Chief Constable of Sussex* (n 13).

<sup>23</sup> See *Larner v Solihull Metropolitan Borough Council* [2001] RTR 32 above, *Kent v Griffiths* [2001] QB 36 (CA).

<sup>24</sup> See his lordship’s dissenting judgment in *Stovin v Wise* [1996] AC 923 (HL). His lordship seems to have recanted somewhat in *D v East Berkshire* (n 14).

<sup>25</sup> See *Barrett v Enfield LBC* [1999] 3 WLR 79 (HL) and *Phelps v Hillingdon LBC* [2000] 3 WLR 776.

Steyn<sup>26</sup> – has persistently argued in favour of an expanded liability. Their reasons for doing so have not always been made explicit but they are well expressed by Lord Bingham in an article of 2010:<sup>27</sup>

“...if a member of the public whom a public service exists to serve suffers significant injury or loss through the culpable fault or reprehensible failure of that service to act as it should, is it not consistent with ethical and, perhaps, democratic principle that the many, responsible for funding the service, should bear the cost of compensating the victim?”

This way of thinking involves an explicit rejection of the second proposition set out above. That it persists can be seen in the judgment of the minority in the recent *Michael* case,<sup>28</sup> considered further below. In the rest of this article, I shall refer to the principle enunciated by Lord Bingham as “the Bingham principle”.

### 3 ASSUMPTION OF RESPONSIBILITY

The most strenuous attempts to define assumption of responsibility are found not in the case law but in the work of commentators. Since the commentators who go to such lengths to define the concept also believe that its application – and that of cognate notions – to cases involving public authorities can produce a satisfactory law of public authority negligence liability, it is worth briefly reviewing these attempts at definition.<sup>29</sup> On certain points, they are in accord. They agree that in order

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<sup>26</sup> See his Lordship’s concordant but more pro-liability speech in *Gorringe*.

<sup>27</sup> Lord Bingham, ‘The Uses of Tort Law’ (2010) 1 JETL 3.

<sup>28</sup> *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 2 WLR 343.

<sup>29</sup> The commentators whose views I discuss here are: N McBride and A Hughes, ‘*Hedley Byrne* in the House of Lords: an Interpretation’ (1995) 15 LS 376; R Bagshaw, ‘The Duties of Care of Emergency Service Providers’ [1999] LMCLQ 71; R Stevens (n 5); D Nolan (n 5); R Bagshaw and N McBride (n 6). To avoid the confusions associated with the expression “assumption of responsibility”, use of it is avoided in the article by McBride and Hughes and in Bagshaw and McBride’s book. For the sake of convenience, I overlook this nuance here. In each work, a principle is advanced that is intended to explain some, at least, of the decisions in which the courts used the expression.



to assume responsibility, the defendant must perform some positive act.<sup>30</sup> They agree too that the question of whether or not the defendant has assumed a responsibility toward the claimant is an objective one i.e. that the existence of an assumption of responsibility does not depend on there being an intention on the defendant's part to incur an obligation – legal or otherwise – towards the claimant. A corollary of this is that, while the judges in *Hedley Byrne* and in some other early cases talked of *voluntary* assumption of responsibility, assumption of responsibility is now taken to be voluntary in only a very restricted sense.<sup>31</sup>

The differences between the various accounts of the concept relate to the question of whether or not there must be explicit dealings or “mutuality” between defendant and claimant and whether it is necessary for the claimant to have relied on the defendant's undertaking. A number of writers have insisted that mutuality and reliance are not prerequisites of assumption of responsibility. They are not, however, in precise agreement as to what *are* prerequisites. Stevens states that “[t]he foreseeable possibility of detriment, whether by reliance of the claimant or a third party, is relevant and will commonly be decisive in determining whether, as a matter of construction, the defendant has by his actions implicitly assumed responsibility towards the claimant.”<sup>32</sup> Nolan appears to follow him in this.<sup>33</sup> McBride and Hughes<sup>34</sup> and Bagshaw<sup>35</sup> emphasize a

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<sup>30</sup> cf Lord Hoffmann in *Customs and Excise Commissioners v Barclays Bank* [2006] UKHL 28, [2007] 1 AC 181 [38]: “the notion of assumption of responsibility serves a ... useful purpose in drawing attention to the fact that a duty of care is ordinarily generated by something which the defendant has decided to *do*”.

<sup>31</sup> As Nolan puts it, “[t]he better view, which was expressed by Lord Walker of Gestingthorpe in the *Customs and Excise Commissioners* case, is that the undertaking is voluntary because it is ‘conscious’, ‘considered’ or ‘deliberate’”. See ‘The Liability of Public Authorities for Failing to Confer Benefits’ (n 5) 283 and *Customs and Excise Commissioners v Barclays Bank Plc* (n 30) [73].

<sup>32</sup> Stevens (n 5) 14.

<sup>33</sup> Nolan (n 5) 281. A similar view of assumption of responsibility appears also to be taken by Allan Beever (n 5) ch 8.

<sup>34</sup> See McBride and Hughes (n 29) 284: “[t]he defendant has accepted power over the plaintiff knowing that he is expected to use reasonable care and skill in exercising that power. He has failed to do so and the plaintiff has suffered loss as a result.” I assume that the defendant having power over the claimant entails dependence on the part of the claimant.

<sup>35</sup> Bagshaw ‘The Duties of Care’ (n 29) 77: “at the very least the defendant must undertake a task which he holds himself out as having special skill and

combination of dependence on the part of the claimant and skill and knowledge of the claimant's dependence on the part of the defendant. Bagshaw, Stevens and Nolan all point, as illustrating the absence of the need for reliance, to the example of the doctor who comes to the aid of an unconscious patient. The doctor assumes responsibility for treating the patient with reasonable care despite the patient being in no position to consciously rely on the treatment.

A principle significantly different from any of those discussed in the previous paragraph has been advanced by Bagshaw and McBride in their text book. This is that "if A has indicated to B that B can safely rely on him to perform a particular task with a certain degree of care and skill and B has so relied on A, A will owe B a duty to perform that task with that degree of care and skill".<sup>36</sup> Here actual reliance is central. Since, however, this principle can explain only a small proportion of the cases in which assumption of responsibility is invoked, the authors set out a number of other principles to explain the remaining cases. The most important of these is a principle of "severe dependency".<sup>37</sup> This states that "if A knows that B's future will be ruined if he does a positive act X, then A will owe B a duty to take care not to do X".<sup>38</sup> The authors use it to explain *Spring v Guardian Assurance*,<sup>39</sup> *Phelps v Hillingdon LBC*<sup>40</sup> and *Smith v Eric S Bush*,<sup>41</sup> and also what they call cases of "business sterilisation". These are cases in which the defendant acts in such a way as to cause the foreseeable destruction of the claimant's business and may occur where the defendant is a regulatory authority able to damage the claimant by the

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competence to undertake, and the task must be one which he knows the plaintiff is dependent on being done with reasonable skill and competence."

<sup>36</sup> Bagshaw and McBride *Tort Law* (n 6) 180. This is what the authors call "the extended principle in *Hedley Byrne*" as opposed to "the basic principle in *Hedley Byrne*", set out at 175, which relates purely to advice. The former presumably includes or implies the latter.

<sup>37</sup> Other principles proposed by Bagshaw and McBride (n 6) 200-06 are a principle of liability for negligent intermeddling, invoked to explain *White v Jones* [1995] 2 AC 207, a principle of liability for expenses incurred as a result of putting property in danger, invoked to explain the *Greystoke Castle* [1947] AC 265, and a principle of liability for interfering with intangible property, invoked to explain *Minister of Housing and Local Government v Sharp* [1970] 2 QB 223.

<sup>38</sup> Ibid 97.

<sup>39</sup> [1995] 2 AC 296.

<sup>40</sup> n 35.

<sup>41</sup> *Smith v Eric S Bush, Harris v Wyre Forest DC* [1990] 1 AC 831.

use of its coercive powers<sup>42</sup> or where the defendant is a private person able to harm the claimant by other means.<sup>43</sup>

In sum, these attempts to make sense of the case law in which the concept of assumption of responsibility is used yields two types of principle. The first requires explicit dealing and mutuality between the parties. The second does not but requires instead foreseeable detriment flowing from the reliance of the claimant or a third party or a combination of dependence on the part of the claimant with knowledge of that dependence on the part of the defendant.

All the versions I have described of these principles require a positive act and the assertion of some knowledge or skill on the part of the defendant and take the question of whether there is an assumption of responsibility to be an objective one in the sense explained above.

From the point of view of the argument I wish to make in this article, it is the elements that these different competing conceptions of assumption of responsibility have in common that are important. Little turns on the differences, which all concern the extent to which the defendant can be held to have assumed a responsibility towards parties with whom she has no direct dealings or of whom she has limited knowledge.<sup>44</sup> At the same time, the more wide-ranging and the greater the explanatory power of the version of the concept I adopt, the more convincingly will my argument (if successful) achieve its aim of demonstrating the concept's unsuiteness to determining the incidence of the duty of care in relation to public authorities. I therefore, and at the risk of solecism, propose to use the expression "assumption of responsibility" as an umbrella term covering all the principles and sub-principles I have described in this section.

A further question concerns the relationship between assumption of responsibility and policy considerations limiting the incidence of the duty

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<sup>42</sup> As in *Harris v Evans* (n 14) or *Jain v Trent Strategic Health Authority* (n 15).

<sup>43</sup> As in the Australian case of *Perre v Apand Pty Ltd* (1999) 198 CLR 180 where the defendant sold diseased potato seeds to farmers whose farm was close to the claimants' potato farm with the result that the claimants' potatoes fell foul of a legal prohibition on the sale of potatoes from an area where there were diseased potatoes. The claimants sued successfully on the basis of the economic loss they suffered.

<sup>44</sup> Nearly every application of the concept I consider below is consistent with the requirement that there be direct dealings between the parties. In the only one that is not – *Minister for Housing and Local Government v Sharp* (n 37) – the defendant had direct dealings with a third party in the knowledge that careless performance of the task he had undertaken would harm the claimant.

of care. On the one hand, the finding of an assumption of responsibility is sometimes taken to obviate the need to consider questions of policy and hence to satisfy by itself the fair, just and reasonable limb of the *Caparo* test.<sup>45</sup> On the other hand, in some cases, notably those concerning the duties of the police towards members of the public, the existence of an assumption of responsibility is treated as an indicator in favour of a duty of care than can be outweighed by contrary policy considerations.<sup>46</sup> The commentators who have insisted most strongly on the meaningfulness of the family of concepts I have grouped together under the title “assumption of responsibility” do so because they think policy considerations have no place in the law of negligence. On the basis of the strategy enunciated above of adopting the form of the concept with the greatest explanatory power, however, I shall treat the presence of an assumption of responsibility as an indicator in favour of liability capable of being overridden both by the consequential factors usually referred to as policy considerations and by the restrictive principles in the fourth proposition described in section I above.

Finally, it has been argued, notably by Barker, that the courts use different versions of the concept of assumption of responsibility, no one of which is capable of explaining all the cases, and switch back and forth between them as a way of accommodating concealed policy concerns.<sup>47</sup> In the light of this, it might be objected that there is no point in examining the application of the concept to public authorities since it cannot even explain the cases in which it is used in relation to private defendants. There are two answers to this objection. The first is that by adopting the position that there is an assumption of responsibility where any one of the proposed tests is satisfied, I avoid the problem that arises where the courts speak of the concept as if it were a unitary one while meaning different things by it on different occasions. The second concerns the formalism or conceptualism of the current law. As I have suggested above, the current

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<sup>45</sup> See *Henderson v Merrett Syndicates* [1995] 2 AC 145 [181D] (Lord Goff); *Brooks v Metropolitan Police Commissioner* (n 13) [29] (Lord Steyn).

<sup>46</sup> See the cases referred to at notes 48-51.

<sup>47</sup> See K Barker, ‘Unreliable Assumptions in the Law of Negligence’ (1993) 109 LQR 461; K Barker, ‘Wielding Occam’s Razor: Pruning Strategies for Economic Loss’ (2006) 26 OJLS 289. This implies, of course, that the concept of assumption of responsibility is not really distinct from the broader concept of proximity. Many dicta suggesting this are to be found in the case law. More recent academic assertions of this view are to be found in K Barker, R Grantham and W Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart, 2015).

approach of the courts to the negligence liability of public authorities substitutes conceptual barriers to duties of care for the policy based barriers that were more common in the pre-*Gorringe* case law. At the same time, the supporters of this change in the law propose a highly conceptual or formalistic method for determining the incidence of the duty of care in relation to public authorities via the use of concepts such as assumption of responsibility. If this approach can be shown not to succeed in its own terms, then the unsatisfactory nature of the current law will be exposed, notwithstanding the concept's disutility in the kinds of case in which it was originally developed.

#### **4 THE APPLICATION OF THE CONCEPT OF ASSUMPTION OF RESPONSIBILITY TO PUBLIC AUTHORITIES**

I turn then to consider how the concept of assumption of responsibility can be applied to various types of case involving public authorities. The types I shall consider are (as I shall call them) protection cases, cases involving the giving of advice or information, rescue cases, professional cases and cases involving legal determination of the rights or entitlements of private persons. The meaning of these categories will become clearer below. I arrange them according to how successfully the concept of assumption of responsibility can be applied beginning with those to which it can be applied most successfully and ending with those to which it can be applied least successfully.

Two difficulties that arise from the attempt to apply the concept of assumption of responsibility are worth outlining in general terms before examining the particular types of case. The first concerns omissions. As we have seen, it is a requirement of the concept that, in order to incur a duty of care, a defendant must perform some positive act that brings her into a relationship with the claimant. When this requirement is applied to public authorities, however, it tends to produce unsatisfactory results. Where the defendant is a private person, it makes sense to subject her to a duty where she positively undertakes to assist the claimant and not to subject her to a duty where she makes no such positive undertaking. Where the defendant is a public authority which exists to serve a citizen, to draw a distinction between the case in which the authority makes some positive undertaking and the case in which it does not may make less sense. As a matter of public law or of moral obligation, the authority may be under an obligation in both cases and to insist on the distinction when making a decision as to when to order the payment of compensation may

lead to a pattern of decisions that would strike most people as indefensible.

The second difficulty arises from the need to distinguish the class of cases in which a public authority may be held to have assumed a responsibility to the claimant from the class of cases in which a public authority causes harm to a citizen or citizens by the failure to exercise its powers properly. We may think of the latter class of cases as defined by the Bingham principle i.e. as being the class of cases in which a member of the public whom a public service exists to serve suffers significant injury or loss through the culpable fault or reprehensible failure of that service to act as it should. The Bingham principle does not represent the law. As described above, this discourages the finding of a duty of care in relation to most public authority functions. One would thus expect that the class of cases in which a public authority could be held to have assumed responsibility toward the claimant would be a much smaller one than the class of cases defined by the Bingham principle. But it is not so simple in practice.

A public service, to use Lord Bingham's terminology, exists to serve a citizen. Where it fails reprehensibly to act as it should and thereby causes loss to the citizen, the law presently puts considerable obstacles in the way of any claim to compensation based on negligence. Most importantly, as per proposition two above, the fact that the service exists to provide a service to a citizen – that it has statutory powers that enable it to do so and is subject to statutory target duties that require it to do so – cannot be a reason for imposing a duty of care. Yet if a person becomes subject to a duty of care where she purports to be able to perform a task with skill and knows that another is likely to depend on her so performing the task or where she indicates to another that the other can safely rely on her performing a task with skill and the other does so rely, then public authorities must very often be subject to duties of care even and especially where the task they are performing is the one that they exist to perform. The doctrine of assumption of responsibility may thus require a duty of care in exactly the circumstances in which the wider framework governing the negligence liability of public authorities discourages it.

### **4.1 Protection Cases**

I begin with what is really a residual class of cases. It consists of cases in which a public authority is or is alleged to be under an obligation to protect citizens from some – usually physical - danger to their safety. It is distinct from what I call below “professional cases” in that the public authority employees involved are not usually professionals; and from

what I call below “rescue cases” in that the authority in question is not apprised of the danger at exactly the moment that it is about to occur. Into this class fall many types of police case, for example: cases in which the police are aware of the activities of a criminal who poses a threat to members of the category of persons to which the claimant belongs;<sup>48</sup> cases in which the police are aware of a specific threat to the claimant’s safety from a particular person;<sup>49</sup> cases in which the claimant is a witness and the police are alleged to owe a duty to take care to conceal her identity and to protect her from violence;<sup>50</sup> cases in which the claimant is a suspect and the police or prosecuting authorities are alleged to owe a duty to take care in investigating the case against him.<sup>51</sup> Into this class also fall a wide variety of other types of case, for example: cases in which highway authorities are alleged to owe a duty of care to members of the public to avert dangers on the road;<sup>52</sup> cases in which local authorities are alleged to owe duties to protect their tenants from the depredations of other tenants or neighbours;<sup>53</sup> cases in which health authorities are alleged to owe duties to protect members of the public from infection.<sup>54</sup>

For cases which fall into this residual class, the notion of assumption of responsibility does appear to provide a rationale for imposing a duty of care in some cases and not others. To take the police cases referred to, for example, the idea that the police assume a responsibility towards witnesses or informants but not towards members of the public potentially endangered by the presence at large of a criminal provides an explanation of why there should be a duty of care in the former cases but not in the latter. Cases in which the police fail to protect an individual from the threat of a particular known individual occupy a point on the spectrum between the two types of case referred to in the previous sentence and are

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<sup>48</sup> *Hill v Chief Constable of West Yorkshire* (n 13).

<sup>49</sup> *Osman v Ferguson* [1993] 4 All ER 344 (CA); *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] AC 225.

<sup>50</sup> *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464 (CA).

<sup>51</sup> *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692; *Elgouzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335; *Brooks v Metropolitan Police Commissioner* (n 13).

<sup>52</sup> *Stovin v Wise* (n 24); *Gorringe* (n 3).

<sup>53</sup> *Mitchell v Glasgow City Council*, *X v Hounslow London Borough Council*, both (n 13).

<sup>54</sup> *Furnell and another v Flaherty (trading as Goldstone Farm)(Health Protection Agency and another, Part 20 defendants)* [2013] EWHC 377 (QB), [2013] PTSR D20.

for that reason especially contentious.<sup>55</sup> It would seem very plausible to ascribe to a police force which is apprised of and takes some steps to protect a claimant from a threat from a particular known individual an assumption of responsibility towards the claimant. In the light of this, the finding that no duty of care is owed in such cases can only be explained by reference to the supposed conflict between the putative duty of care and the police's other obligations.

## 4.2 Information Cases

Another category in relation to which assumption of responsibility appears to serve reasonably well as a mechanism for determining the incidence of the duty of care comprises cases in which a public authority has power to give advice or information to a citizen and chooses to do so. For example, in *T v Surrey County Council*<sup>56</sup> the defendant authority kept the name of a particular child minder on the register of child minders it was obliged by law to maintain. T's mother left T in the care of the child minder after having sought and received assurances from an employee of the authority that the child minder was to be trusted. In fact, on a previous occasion, the child minder had caused injury to a child by violent shaking and did the same to T. The court held that although the purpose of the governing legislation was to ensure that only persons who were fit to act as child minders should be registered, it did not give rise to duties to any individuals who might rely on the register. The giving of specific assurances by the authority to T's mother was, however, capable of giving rise to a duty of care and the assurances constituted negligence misstatement. Here the notion of assumption of responsibility (or its cognate, negligent misstatement) makes it possible to pick out a particular act of the authority as attracting a duty of care where its other related activity does not. There is a fine line, however, between cases in which an authority merely has a power to give information to a specific individual and cases in which, by doing so, it changes the legal position of the individual concerned. As we shall see below, the use of assumption of responsibility in relation to the latter is more problematic.

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<sup>55</sup> Note, in this respect, the dissenting judgment of Lord Bingham in *Van Colle* (n 49).

<sup>56</sup> [1994] 4 All ER 448.



### 4.3 Rescue Cases

At time of writing the four leading judgments in rescue cases in English law are *Capital and Counties PLC v Hampshire CC*,<sup>57</sup> *OLL Ltd v Secretary of State for Transport*,<sup>58</sup> *Kent v Griffiths*,<sup>59</sup> and the more recent *Michael and others v Chief Constable of South Wales Police*.<sup>60</sup> In *Capital and Counties*, the Court of Appeal heard appeals in four cases in which the fire brigade had been called to fires and failed to put them out. *OLL* concerned the mismanagement by the coastguard of an attempted rescue of a party of schoolchildren who had got into trouble at sea. *Kent* concerned the calling of an ambulance whose late arrival led to the claimant suffering injuries that she would have avoided if the ambulance had arrived timeously. In *Michael*, a telephone call to the police from a woman in danger of imminent violence was wrongly classified with the result that the police arrived too late to save her life.

The role actually played by assumption of responsibility in the court's judgment in each of these cases is fairly limited. The question I wish to address, however, is whether the concept can be used nonetheless to explain the pattern of outcomes that occurred. Donal Nolan has attempted to rationalise the differing outcomes of rescue cases concerning the ambulance service, fire brigade and police using a conception of assumption of responsibility as involving the voluntary acceptance of an obligation by the defendant combined with the foreseeable possibility of detrimental reliance on the part of the claimant.<sup>61</sup> On this view, the reason why there is an assumption of responsibility and hence a duty of care when an injured person summons an ambulance but none where the fire brigade is summoned to put out a fire or the police are summoned to the scene of an emergency is that a person who summons an ambulance is likely to renounce the alternative means of transport available to her whereas a person who summons the other emergency services is likely to have no other means of assistance to renounce. The paradoxical consequence of this reasoning, however, is that the more absolutely dependent a citizen is on the protection provided by a public authority, the less likely the authority is to owe her a duty of care.<sup>62</sup> It would

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<sup>57</sup> [1997] QB 1004 (CA).

<sup>58</sup> [1997] 3 All ER 897 (QB).

<sup>59</sup> [2001] QB 36, [2000] 2 WLR 1158 (CA).

<sup>60</sup> [2015] UKSC 2, [2015] 2 WLR 343.

<sup>61</sup> Nolan (n 5) 281.

<sup>62</sup> cf N McBride, 'Michael and the Future of Tort Law' (2016) 32 PN 14-31.

presumably mean, for example, that someone who lived on a remote island and who could only be brought to hospital by air ambulance would be owed no duty of care if she called the ambulance service whereas if she lived in a busy town and called the ambulance service, she *would* be owed a duty.

On the most plausible interpretation of how assumption of responsibility should apply to rescue services, I suggest, *all* the services I have referred to would be held to have assumed a responsibility and hence to owe a duty of care upon acceptance of an emergency call. Any person who calls one of these services in an emergency is likely to rely on the service and if a call is made on a person's behalf and she is unaware of it (as happens, for example, if a third party makes a call to the ambulance service to rescue an unconscious person), she is very likely to depend on the service fulfilling its function with reasonable care.<sup>63</sup>

This leads us naturally to question whether this is a satisfactory pattern of outcomes? Policy fears about the supposed strain on the rescue services aside, I suggest it is; but with one important caveat. As noted above, however one interprets assumption of responsibility, it seems to require that the defendant perform some positive act that can be treated as constituting acceptance of an obligation towards the claimant. In rescue cases, given the general expectation that rescue services will attempt to assist people who ask for their help, the acceptance of the call for help will usually be enough to constitute such a positive act. But suppose a service's phone operator does not answer the call or tells the caller that no assistance will be forthcoming in circumstances where it is quite unreasonable to do so, for example where the service in question is the fire brigade and is perfectly capable of coming to the caller's aid and has at the time in question no competing demands for its assistance.<sup>64</sup> Suppose further that the caller suffers harm that would probably have been avoided if the fire brigade has attended the fire. It makes no sense, I suggest, to differentiate a case such as this by denying the existence of a duty of care if one would be found in the case in which the phone operator allowed the caller to believe that the fire brigade would attend.

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<sup>63</sup> Even if we accept the argument that the fire brigade should not be under a duty to answer emergency calls because this duty would conflict with its wider obligations, we are nonetheless left with a pattern other than the actual one.

<sup>64</sup> cf D Brodie, 'Public Authority Liability: the Scottish Approach' (2007) 11 Edin LR 254, 256.

#### 4.4 Professional Cases

The offer of help – explicit or implicit – to a member of the public by a qualified professional is the paradigm example of assumption of responsibility. For this reason, one would expect the concept to apply most easily in those cases in which the claimant's complaint against a public authority can be treated as a complaint about the failure of a professional person employed by the authority to provide the relevant service. This expectation is, to some extent, borne out by the case law. Bodies within the NHS can be held vicariously liable for the failure of the doctors working for them to provide the treatment expected;<sup>65</sup> local authorities can be held liable for the negligent misstatements of the surveyors they employ;<sup>66</sup> and education authorities can be held liable for the failure of the teachers and educational psychologists they employ to respectively provide adequate education or correct diagnosis for children with special educational needs.<sup>67</sup> It is arguable also that local authorities can be held liable for the omissions of the professionals they employ in the field of child protection.<sup>68</sup>

A difficulty with the idea that public authorities can be held vicariously liable for the acts of professionals they employ is that it, too, can produce obvious anomalies. Where a local education authority or the social services department of a local authority causes harm to children, it may be because the professionals who work for the authority have failed in their professional duty – the head master of a school may have failed to provide a child with appropriate education, social workers may have failed to take the steps necessary to remove a child from abusive parents – but it may also be because of failings that are administrative rather than professional in nature and cannot be ascribed to any particular individual. So, for example, a badly run education authority might fail through simple administrative incompetence to make the arrangements necessary to assist a child who needs home schooling or the social services department may have been informed that a child needs its help but, again, through administrative incompetence – because there is a rapid turnover of staff, because files are lost and letters or emails left unopened – may have failed to take the necessary steps. It would be hard to justify making a finding of

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<sup>65</sup> *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (QB).

<sup>66</sup> *Smith v Eric S Bush* [1990] 1 AC 831 (HL).

<sup>67</sup> *Phelps v Hillingdon London Borough Council* (n 25).

<sup>68</sup> See *D v East Berkshire Community Health NHS Trust* (n 14).

liability in the cases that conformed to the model of vicarious liability for failings of professionals while denying it in the cases where the causes of harm were of the administrative type.<sup>69</sup>

This problem can be avoided if we take the view that professional liability is only a special case of assumption of responsibility. We can then say that the authorities that employ professionals assume a responsibility toward the persons whom they aim to assist. This solution brings us back to the problem of omissions, however. As noted above, assumption of responsibility, however interpreted, requires some sort of positive act on the part of the defendant and yet some of those failures on the part of authorities to provide expected services that cannot be ascribed to identifiable professionals will also be cases of pure omission. Consider again, for instance, the example of the social services department given information about a child in danger which fails through sheer administrative incompetence to act timeously. In such a case, the defendant authority may never make towards the child a gesture that could be interpreted as an assumption of responsibility and yet, to refuse liability in this case while finding it in another in which a similar failure is preceded by such a gesture would be, again, to make an indefensible suggestion.

### 4.5 Legal Determination Cases

Cases which involve the making of legal determinations by public authorities as to the rights or entitlements of private persons and in which the question of tortious liability arises are rare, but they exist. One such is the well-known *Maguire* case<sup>70</sup> in which the claimants fitted out vehicles for use as taxis in reliance on a policy promulgated by the local authority but were then denied the licences necessary to operate the taxis when the policy turned out to be unlawful. Another is the *Banks* case<sup>71</sup> in which the claimant was a farmer who suffered financial loss when the Secretary of State made his herd the subject of a Movement Restriction Order on the basis of a fact-finding process vitiated by procedural impropriety. A third example is the *Jain* case referred to above where the claimants were the proprietors of a care home who suffered the ruination of their business after the defendant health authority obtained an ex parte court order

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<sup>69</sup> cf Booth and Squires (n 17) 9.102-9.110.

<sup>70</sup> *R v Knowsley MBC, ex p Maguire* (1992) 90 LGR 653.

<sup>71</sup> *Banks v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 416, [2004] NPC 43.

cancelling the home's registration on the basis of inaccurate information.<sup>72</sup>

It might be thought that in relation to cases of this sort, the concept of assumption of responsibility had no relevance at all. Legal determinations are the purest form of exercise of public law power and it is widely supposed that the functions they involve are too unlike the activities undertaken by private persons for it to be possible for negligence to have any application.<sup>73</sup> Since assumption of responsibility is a concept belonging to the law of negligence, it too is supposed to have no place in legal determination cases. Assumption of responsibility would thus appear to be relevant only in the sense that there was a kind of negative correlation: there is never assumption of responsibility in such cases and, correspondingly, there is never a duty of care. For two reasons, this appearance is misleading however.

Firstly, one can make a strong case that wherever a public authority makes a legal determination with respect to the rights or entitlements of a particular citizen, it assumes a responsibility towards that citizen. All the necessary elements are there: the authority acts positively with respect to the citizen; the citizen will commonly be reliant or dependent for some aspect of her welfare on the authority's act, or both: and the citizen will be aware of this reliance or dependency. In most such cases, moreover, the authority's act can be seen as involving a representation as to the authority's power to perform the act, a representation which amounts to a species of negligent misstatement where it turns out to be false. So in *Maguire*, for example, the authority gave the false impression to the claimants that they would receive taxi licences and they suffered loss as a result while in *Banks*, the claimant was led to believe that his herd was subject to a valid Movement Restriction Order when it was not and suffered loss as a result.

Secondly, parties have attempted to invoke assumption of responsibility in a number of cases involving the making of legal determinations by public authorities and while the argument has been rejected in some cases it has been accepted in others.<sup>74</sup> An early example

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<sup>72</sup> n 15.

<sup>73</sup> This supposition is an expression of what I called in Section I above "the background premise".

<sup>74</sup> Cases in which the argument has been made and rejected are: *W v Home Office* [1997] Imm AR 302; *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598, [2007] 1 WLR 2861; *St John Poulton's Trustee in Bankruptcy v Minister of Justice* [2010] EWCA Civ 392, [2011] Ch 1. In addition to the cases

of a case where the argument succeeded is *Ministry of Housing and Local Government v Sharp*.<sup>75</sup> This involved a scheme whereby persons who suffered loss as a result of the denial of planning permission were paid compensation. If permission were later granted the developer had to repay the compensation to the Ministry and this obligation was recorded on the local charges register as a local land charge. Under the governing legislation, the registrar of local charges was the clerk to the relevant local authority. It was his duty to register the charge and where an official search was requisitioned, to produce a certificate indicating the charge's existence. The facts were that an owner of land subject to such a charge obtained planning permission and sold the land to a developer. Prior to the sale, the developer's solicitor requisitioned a search of the local charges register but due to the negligence of a clerk in the registry, the resulting certificate made no reference to the charge. As the Court of Appeal held, the certificate was conclusive as against the Ministry and the developer was thus able to avoid having to pay back the compensation. The Ministry sued the local registrar, Sharp, and his employer, the local authority, for breach of statutory duty and negligence. The members of the Court of Appeal were not able to agree as to whether an action lay for breach of statutory duty – Lord Denning MR thought it did while Salmon and Cross LJ thought it did not – but they were able to agree that Sharp was liable for negligent misstatement on the principle of *Hedley Byrne* and his employer, the local authority, conceded that it was vicariously liable.

The case provides a good illustration of the fine line between the situation in which an authority causes loss by giving out erroneous information (discussed above under the heading “information cases”) and the situation in which an authority harms a person by the improper or careless exercise of its power to determine legal rights or entitlements. It is easy to represent as being an instance of the former: the clerk to the local authority mistakenly informed the developer that there was no charge and his employer, the local authority, conceded that it was vicariously liable for the resulting loss. On a true legal analysis, however, it was an instance of the latter. As Lord Denning explained,<sup>76</sup> in his role as local registrar Sharp was not a servant of the local authority. Qua registrar, he was under a statutory duty to provide an accurate certificate and the certificate was conclusive as to the existence or not of the charge.

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mentioned in the text, the argument was made and partly accepted in *McCreaner v Ministry of Justice* [2014] EHC 569 (QB), [2015] 1 WLR 354.

<sup>75</sup> n 37.

<sup>76</sup> At p 265.

The registrar's careless exercise of his power thus had the effect of depriving the Ministry of its right to the money secured by the charge. The judges of the Court of Appeal fudged or glossed over this difference, but we should not allow their equivocation to blind us to true nature of their decision.

*Sharp* is peculiar in that the right or entitlement in question was that of a branch of government.<sup>77</sup> There are other cases in which public authorities have been held to assume responsibility in the exercise of powers to determine rights or entitlements, however, in which the persons affected have been ordinary citizens. One such case is *Neil Martin Ltd v Revenue and Customs Commissioners*.<sup>78</sup> The claimant in this case was a builder who applied to the Revenue for a certificate which he needed to in order to obtain work as a subcontractor. In processing his claim, the Revenue made a series of errors with the result that he only obtained the certificate after a long delay, thus occasioning loss. The errors included wrongly insisting that he had to produce company accounts, failing to ensure that he signed the relevant forms while at the tax office, mistakenly treating the forms submitted by the claimant as an application for something other than the required certificate, marking a second set of forms with the wrong Unique Tax Reference, and sending the certificate once granted to the wrong address. The Court of Appeal held that the third of these errors, but not the others, gave rise to a duty of care: in deciding to treat the claimant's application as an application for something other than the sought after certificate, the anonymous employee had assumed a responsibility towards the claimant and the Revenue was vicariously liable for its breach.

Another example is *Welton v North Cornwall District Council*.<sup>79</sup> Here, the owners of a guest house made expensive improvements to their premises on the advice of an environmental health officer given when the officer paid them an informal visit. The improvements turned out not to be required under the relevant legislation. On the owners' action for recovery of the wasted expenses, the Court of Appeal held that the officer had, in effect, been offering an advisory service and could thus owe a duty of care to the owners and be liable for negligent misstatement. In reaching its judgment, the court emphasized the informal nature of the officer's visit and characterized the giving of advice as beyond the officer's

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<sup>77</sup> Moreover, if the registrar could be represented as making a direct undertaking to anyone it would be to the person seeking the certificate.

<sup>78</sup> [2007] EWCA Civ 1041; [2007] All ER (D) 897.

<sup>79</sup> [1997] 1 WLR 570.

statutory functions. The case might thus appear to fall outside the category of cases involving the making of a legal determination as to rights or entitlement. As Lord Scott VC pointed out when he distinguished *Welton* in another case,<sup>80</sup> however, the officer's giving of advice could not plausibly be differentiated from his statutory functions in this way. The plaintiffs did what he told them to do not simply because he was an expert on the subject who had proffered advice but because he had coercive powers which they believed he would use against them: the officer's giving of advice in this context was itself an exercise of coercive power. The case thus concerns the exercise of a public authority's powers to determine rights, despite the Court of Appeal's attempt to make it appear otherwise.

It is, of course, a noteworthy feature of these cases that the courts never admit that a public authority making a determination as to rights or entitlements can, in so doing, make an assumption of responsibility. In each case, the court pretends that some employee of the authority has somehow stepped outside its statutory function and performed an act of the sort that would involve assumption of responsibility if performed by a private person. Justifications have occasionally been advanced in the case law for the view that assumption of responsibility is incompatible with the performance of a statutory function. One is that where a public authority is subject to a statutory duty to act it cannot be said to have assumed responsibility towards those affected by its action because it was not acting voluntarily.<sup>81</sup> This insistence that a person can only assume responsibility in relation to acts which she is not legally obliged on other grounds to perform is inconsistent with the definition of assumption of responsibility I set out above, however. It assumes a reading of "voluntary" as entailing freedom of choice whereas, in a number of leading cases, defendants have been found to have assumed responsibility despite being under a legal obligation to perform the act to which assumption relates.<sup>82</sup> To define assumption of responsibility in this way,

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<sup>80</sup> *Harris v Evans* (n 14).

<sup>81</sup> See *Customs and Excise Commissioners v Barclays Bank Plc* (n 30) [14] (Lord Bingham), [94] (Lord Mance) respectively; *Neil Martin Ltd v Revenue and Customs Commissioners* [2006] EWHC 2425 (Ch) 97 (Andrew Simmons); *Rowley v Secretary of State for Work and Pensions* (n 74) [54] (Dyson LJ); *Darby v Richmond upon Thames LBC* [2017] EWCA Civ 252 [18] (Thirlwall LJ).

<sup>82</sup> See *Barrett v Enfield LBC* and *Phelps v Hillingdon LBC*, both (n 25), in both of which the defendant public authorities were held to owe duties vicariously as a result of actions performed by the professionals they employed while at the same



moreover, would have the consequence that the concept could not be used to explain the incidence of the duty of care in cases involving public authorities since most public authority cases in which an assumption of responsibility may be found are ones in which the authority is obliged by statute to perform some action vis-à-vis the claimant.<sup>83</sup>

The conventional picture I presented above of the role that assumption of responsibility might play in legal determination cases is thus false. It is not true that there is never a duty of care in such cases, nor that the concept of assumption of responsibility is not or cannot be used. The concept has been used in some cases. The courts have tried to make it appear that these cases did not truly involve the exercise of powers to determine citizens' rights or entitlements but typically they did involve such exercise. If the concept were used consistently, moreover, it would justify imposing a duty of care in many and perhaps the great majority of legal determination cases. Its use cannot, therefore, be said to justify by itself the current pattern of liability and no liability in such cases. This prompts the question whether assumption of responsibility, in combination with one or more of the exclusionary principles discussed above might produce a pattern like that to be found in the actual case law. In particular, one might ask whether the use of assumption of responsibility together with what I called above the fourth proposition – namely that a putative duty should be excluded if it would be in conflict with the other duties to which the defendant public duty was subject – might produce a pattern of liability like that in the case law.

The answer is that it would not. The legal determination cases in which a duty has been found are ones in which the courts have been able to delude themselves that determination of rights or entitlements was not involved, either by pretending that the relevant acts could be attributed to an employee rather than to the authority itself or that the authority was simply dispensing information. These cases are not ones in which the possibility that a duty of care would conflict with the authority's other public law duties was less present than in cases in which no duty was found. In *Neil Martin*, for example, a duty on the part of the tax

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time being under statutory obligations to act. In a non-public authority context, see *Henderson v Merrett Syndicates Ltd (No 1)* (n 45), in which an assumption of authority arose on the basis of conduct undertaken in fulfilment of a contractual obligation to a third party and *Spring v Guardian Assurance Plc* [1995] 2 AC 296 (HL), where an assumption of authority was held to arise in relation to an act required by the defendant's membership of a self-regulatory body. cf Nolan 'The Liability of Public Authorities for Failing to Confer Benefits' (n 5) 283.

<sup>83</sup> As in *Barrett and Phelps* (n 25).

authorities to correctly determine the claimant's tax status could presumably be said to have conflicted with its duties to do the same for other tax payers and to obtain the maximum tax take for the treasury while in the *Welton* case, a duty on the part of the health inspector to take care in determining the guest house owners' obligation under the relevant legislation could be said to have conflicted with his duty to protect the interests of potential customers of the guest house in health and safety.

The idea of a duty of care based on assumption of responsibility and limited where necessary to avoid conflicting duties also has a serious deficiency from a normative or justificatory point of view. If the typical legal determination case involves an assumption of responsibility and is therefore on all fours with the typical professional case, why should the need to avoid conflicts between duties exclude liability in relation to the former and not in relation to the latter? It might be thought that what distinguishes the two types of cases is that legal determination cases usually involve difficult decisions as to the allocation of resources whereas, in professional cases, once a professional person (whether public or private) has assumed responsibility towards an individual the only issues that arise relate to practical competence in the provision of the service offered. This distinction will not withstand examination, however. Even once a public sector professional has chosen to serve a given individual, the choices she makes in providing the service will have resource implications and involve choices that affect other persons to whom she might owe a duty. An NHS doctor must balance the time spent in administering a treatment to a particular patient against the time to be spent in treating other patients and to attach a duty of care to one patient might be thought to produce a conflict with the duties owed to others; in preparing a statement for a pupil with special educational needs, an education officer will make recommendations having implications vis-à-vis the resources that can be spent on other pupils;<sup>84</sup> and a social worker deciding whether to place a child in care with a foster family and which foster family to choose owes conflicting duties to both the child and the foster families concerned.<sup>85</sup> The choices to be made in these cases do not involve matters of high policy and in the first and second of these examples, the exclusionary principle involved – i.e. that there should not be a duty of care towards a particular individual where the authority concerned owes a duty to all members of the public who share the

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<sup>84</sup> cf *Phelps* (n 25); *Carty v Croydon LBC* [2005] EWCA Civ 19, [2005] 1WLR 2312.

<sup>85</sup> *Barrett v Enfield LBC* (n 25); *W v Essex CC* [2001] 2 AC 592.

situation of the individual in question - is one I represented above as a tendency rather than an absolute rule. Nonetheless, if we compare the potential conflicts of duties involved in such cases with those in the case in which Lord Scott's strict exclusionary principle was enunciated, there seems no reason to allow a duty of care in the former while excluding it in the latter. The failure in *Jain* was to take reasonable care in ascertaining the facts when deciding whether to apply for the cancellation of a care home's licence. No hard question of policy was involved here either and if a health authority cannot be put under a duty of care for fear that it might not cancel a care home's licence when the protection of the occupants' well-being made it necessary to do so, it is hard to see how we can be confident that imposition of a duty of care might not have an equally distorting effect on a doctor deciding which treatment to administer, an education officer recommending special educational provision or a social worker deciding to recommend that a child be placed with a foster family.

Thus the recognition that many legal determination cases might involve an assumption of responsibility on the part of the public authority concerned tends to point up the arbitrariness of the principles of blanket exclusion adopted in recent case law. A more defensible method of determining the incidence of the duty of care in legal determination cases would be to assume its *prima facie* existence and limit it by reference to any deleterious consequences that its imposition seemed likely to have. But it is precisely to avoid such an approach – essentially the one set out in *Anns v Merton Borough Council*<sup>86</sup> – that the current dispensation has been adopted.

A final question is whether an approach to legal determination cases based on the consistent application of assumption of responsibility might produce satisfactory outcomes even if those were not the outcomes to be found in current case law. Having surveyed all categories of public authority cases, however, we are now in a position to see that the consistent application of the concept of assumption of responsibility would produce across the whole range of public authority cases an incidence of the duty of care far more extensive than usually contemplated by the concept's proponents. The question whether use of the concept in relation to legal determination cases is better addressed as part of the larger issue of whether its use can produce a pattern of satisfactory outcomes for public authority cases as a whole and accordingly I postpone it to this article's conclusion.

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<sup>86</sup> n 2.

## 5 CONCLUSION

The concept of assumption of responsibility cannot be used to explain or justify those parts of the law on the negligence liability of public authorities to which it appears to have application. As we have seen, there are various anomalies for which it cannot account.

But if it cannot explain or justify the current law could its consistent application result in something better? One might, speculate on this basis that assumption of responsibility could form the foundation for a more extensive law of public authority negligence and that in doing so it might cure what many have for long felt to be a defect in English law, the lack of a developed form of administrative liability. Such a development would be supported by the principle enunciated by Lord Bingham. It should not surprise us if the consistent application of assumption of responsibility produces the kinds of outcomes required by that principle. As noted above, the paradigm example of assumption of responsibility is the offer of help to a member of the public by a qualified professional. What distinguishes a professional person from any other provider of services is professed expertise and a commitment to serving the public interest. A professional is thus very like a public authority and in some systems is treated as one. What the discussion above has demonstrated, however, is that while a law of public authority negligence liability based on assumption of responsibility might be far more extensive than the concept's proponents envisage, it would still suffer from unjustifiable lacunae as a result of the requirement that a person act positively in order to assume responsibility. Hence, as we saw, the fire brigade that attends a fire and incompetently fails to put it out would be liable while the fire brigade that unreasonably omits to attend would not; the social services department that apprised itself of the facts relating to an abused child and negligently failed to remove the child from her abusive parents would be liable while the social services department that negligently failed to take notice of the child's situation in the first place would not; and so on. If one were minded to use negligence as the vehicle for a developed form of administrative liability, one would therefore be better off relying on the Bingham principle directly than using assumption of responsibility as a kind of proxy.

Faced with the inadequacy of the concept of assumption of responsibility, there are a number of possible responses. One is to continue the so far fruitless search for some concept that is, on the one hand, consistent with the basic principle that public authorities are to be treated as if they were private persons but that, on the other hand, avoids the harsh or seemingly unjust results to which the principle otherwise

gives rise.<sup>87</sup> Another is to adhere to the principle that public authorities must be treated in the same way as private persons while simply accepting that this produces harsh and unjust results. A third response would be to abandon the dogmatic adherence to Dicey's equality principle and to accept at last that English law requires a form of specialized administrative liability, one based overtly on the principle that there should be compensation for the misdeeds of public authorities.

With respect to this last possibility, one final observation is in order. In my description at the beginning of this article of the current state of the law in this area, I outlined what I called "the background premise" namely the view that a public authority acting in the exercise of a public law power or in pursuit of public law duty can *never* owe a duty of care except when it attracts such a duty by performing an activity that might equally well be performed by a private person. In other words, even if it might appear desirable to extend a principle that applies to private defendants in such a way as to impose a duty of care upon a public authority in relation to some activity that lacks an obvious private counterpart, it is somehow never appropriate to do so. The approach of the courts to what I called above legal determination cases tends to confirm the existence of the background premise. In a number of such cases, the courts have justified the imposition of a duty of care by assimilating the acts of the defendant public authority to ones that might be carried out by a private person.<sup>88</sup> Where such assimilation is not possible, however, or where the courts are clear sighted enough to recognize that the case involves the making of a legal determination, despite the superficial resemblance to an activity that might be carried out by a private person, then a duty of care is denied.<sup>89</sup>

What justification is there for this state of affairs? None is to be found in the case law. Instead, the courts present us with a series of ad hoc excuses for restricting liability without ever providing or even

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<sup>87</sup> The notion of "general reliance" propounded by Mason J in *Sutherland Shire Council v Heyman* (1987) 157 CLR 424 and discussed by Lord Hoffmann in *Stovin v Wise* (n 24) 953-55 has been considered for this purpose but with little success. More commonly, adherents of Dicey's equality principle tend to deny that there is any special problem of public authority liability and look instead for principles that will explain why there should be liability in cases (whether with public or private defendants) involving omissions. For a useful exposition of such principles see H Wilberg, 'In Defence of The Omissions Rule in Public Authority Negligence Claims' (2011) 19 TLJ 159.

<sup>88</sup> As in *Barrett* (n 25); *Phelps* (n 25); *Sharp* (n 37); *Neil Martin* (n 81); *Welton* (n 79).

<sup>89</sup> n 74.

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acknowledging the need for a global explanation for the refusal to provide compensation in relation to loss caused by distinctively public law functions. One is left with the sense that the English legal system's lack of a developed form of administrative liability is the product of nothing more than a blind fearfulness and conservatism.